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Via Email and Overnight Mail

Chris Saporita, Esq.
Office of Regional Counsel
United States Environmental Protection Agency
Region II
290 Broadway, 17th Floor
New York, NY 10007-1866

Re: GE/RCA Superfund Site, Harrison, New Jersey Response to GE's Request for General Notice of Liability Letters and to Add Albanese Development Corporation, Albanese Organization, Inc., and Albanese Harrison Lofts, LLC, as Respondents to the Proposed ASAOC

Dear Mr. Saporita:

We write on behalf of BRG Harrison Lofts Urban Renewal LLC (BRG) in response to the General Electric Company's (GE's) February 14, 2019 letter seeking to blame Albanese Development Corporation, Albanese Organization Inc. and Albanese Harrison Lofts LLC (the Albanese Entities) for the mercury contamination GE and RCA left at their former manufacturing campus in Harrison, New Jersey, including throughout the three buildings now owned by BRG (the Site). GE's letter, and the accompanying report prepared by Gary Kleinrichert of FTI, are a transparent attempt to mislead EPA and distract from the fact that GE's operations and failure to remediate its mercury contamination have rendered BRG's property unusable. Without engaging at this time in a lengthy rebuttal of each of Mr. Gottlieb's and Mr. Kleinrichert's conclusory statements and unsupported allegations, BRG, out of respect for your time and consideration, provides this brief response to correct factual misstatements and misapplication of well-established federal Superfund law.

First, it is important to understand GE's submission in the context of GE's record of behavior when confronted with the consequences of its legacy polluting operations. GE time and again seeks to mislead EPA and evade its responsibilities by identifying other parties to blame, generally innocent parties without comparable background in complex mercury assessment and remediation, and then draw these other parties into endless legal

battles in an effort to delay GE's ultimate day of reckoning. No different here, where GE has delayed any meaningful steps toward characterizing or remediating the Site for years, and only recently conducted the characterization study due to EPA's intervention.

GE's own environmental consultant has now submitted a draft building assessment summary to EPA that definitively concludes that *the only source of mercury in the buildings is the historical manufacturing operations of GE and RCA*. GE is fully aware that the Albanese Entities did not cause or contribute to the contamination present in the buildings at the GE/RCA Superfund Site in Harrison, NJ. The extremely limited pre-development work that BRG conducted (selective interior demolition that did not disturb process piping associated with GE's and RCA's manufacturing operations, lead paint stabilization and asbestos removal) was done under GE's supervision and in coordination with GE's efforts to treat the TCE plume under the property. GE has yet to set forth a scientifically-supported theory, as opposed to mere conclusory assertions, as to how these activities increased the amount or extent of mercury in the buildings.

On the other hand, GE's work in the buildings was extensive, invasive and damaging; a fact that both GE's attorneys and its environmental expert intentionally omit in all of their submissions to EPA in an attempt to mislead the agency and cast blame on innocent parties. As detailed in BRG's submission to NJDEP, dated March 12, 2018, GE's extensive cutting and removal of floor slabs, drilling of 120 bore holes (to delineate and treat GE's TCE plume) and GE's initial injection into the TCE plume likely had a meaningful impact on the mercury levels in indoor air in all three buildings.

Since discovering the elevated mercury vapor levels in the buildings, BRG has diligently attempted to get GE to address the contamination, alerted NJDEP, EPA and the Town of Harrison to the conditions in the buildings, and only pursued litigation against GE when it was clear that the buildings would not be addressed absent some intervention by a third party with the authority and ability to require GE to clean up its mess.

In fact, in the face of GE's refusal to address its mercury contamination, BRG proposed to conduct a limited building and sub-surface assessment in late 2016 at its own cost and informed GE in advance of commencing the assessment work. GE responded with a cease and desist directive delivered by its counsel, successfully preventing BRG's efforts to conduct an assessment and delaying the investigation for an additional two years until EPA stepped in and mandated that GE characterize the buildings in 2018. BRG, and no doubt the Town of Harrison, are grateful for EPA's attention to the Site and time spent overseeing the successful characterization and remediation of the property so it can be put to beneficial use.

We believe that the information and legal analysis contained herein is sufficient to allow you to see through GE's smokescreen and proceed with negotiation of the Administrative Settlement Agreement and Order on Consent (ASAOC). However, if you

are inclined to consider GE's submission, we respectfully request the opportunity to engage an expert to rebut GE's arguments before any determination is made as to the status of the Albanese Entities.

I. Albanese Entities are not Operators Under CERCLA

GE's assertion that the Albanese Entities operated at the former GE/RCA buildings fails due to one simple fact: the relationship between the Albanese Entities and BRG was normal for independent companies in the context of a private real estate development. This issue typically arises in the context of parent-subsidiary relationships, and while the Albanese Entities are not the parents of BRG, the precedent that applies in the context of parent corporations is even more persuasive where the entities are not so related. As the Third Circuit correctly pointed out in its decision in *Trinity Industries Inc. v. Greenlease Holding Co.*, "Direct liability attaches to a parent company whose subsidiary owns a facility only if the "act of operating a corporate subsidiary's facility is done on behalf of a parent corporation[.] ... in a manner that exceeds "the interference that stems from the normal relationship between parent and subsidiary." 903 F.3d 333, 363 (3d Cir. 2018) (citing *U.S. v. Bestfoods*, 524 U.S. 51, 65, 71 (1998)). To warrant the direct liability that GE seeks to assign to the Albanese Entities, their behavior must "depart so far from the norms of parental influence...as to serve the parent, even when ostensibly acting on the behalf of the subsidiary in operating the facility." *U.S. v. Bestfoods*, at 70-71.

GE concedes that Albanese entity employees were utilized to undertake development activities *pursuant to the BRG Operating Agreement*. Such arrangement is typical where two or more closely-held private real estate companies form a joint venture through a single-purpose entity LLC that owns and develops the real estate, as is the case here. It is also typical in these arrangements for all management decisions concerning the development, financing, leasing and sale of the real estate to be made by the principals of the members of the joint venture and for the joint venture to engage an affiliate real estate development company to provide the necessary development services because the development company is staffed with experienced real estate professionals that provide services on many projects – not just the project specific to the joint venture. In addition, to accommodate the differing financial interests of the principals/investors of the joint venture and the principals of the development company, it is typical for the joint venture to pay a market rate development fee to the development company to compensate it for the development services provided to the joint venture. The BRG Operating Agreement is structured consistent with these arrangements and the counsel who represented the parties to the BRG Operating Agreement are willing to explain to USEPA that the terms and structure of the BRG Operating Agreement are typical as regards a joint venture between small privately held real estate companies.

Any decision as to whether the Albanese Entities management practices and involvement of the Site constitute direct operation must be considered in light of the type of industry in which they are engaged. *See*, *Trustees of Nat'l Elevator Indus. Pension , Health, Benefit & Educ. Funds v. Lutyk*, 332 F.3d 188, 197 (3d Cir. 2003) ("For a small, closely-held corporation such as [the defendant], the [amount of] initial capitalization may well have been sufficient for that corporate undertaking under normal operating conditions."); *Labadie Coal Co. v. Black*, 672 F.2d 92, 99 (D.C. Cir. 1982) ("Whether capitalization is adequate is understandably a function of the type of business in which the corporation engages."). The members of BRG adequately capitalized the joint venture to acquire the project site and construct the project that was contemplated in the BRG Operating Agreement. The members agreed upon a budget to construct the project and the amount to be financed and capital to be advanced, all of which was advanced to BRG by the members. The capital contributed by the members of BRG together with the typical financing that could be obtained would have been sufficient to develop the project contemplated by the members in the BRG Operating Agreement. The members of BRG are not required to fund the costs of remediating GE's mercury. Those costs are the obligation of GE pursuant to federal and state law, as well as pursuant to the terms of the Indemnity & Settlement Agreement with BRG.

GE's attempt to demonize this relationship as "pervasive" and improper betrays a negligent misunderstanding of normal business operations in real estate development. This is unsurprising, because GE's is a manufacturing conglomerate involved in remediation of many significant sites, and not involved in the typical business relationships of small privately-held real estate companies. Indeed, GE's expert does not claim to, nor does he have, any expertise that would allow him to opine on the normal relationship between a real estate development company and a project-specific entity.

Further, prior to and throughout BRG's period of ownership, GE was responsible for and in control of environmental cleanup and compliance at the Site. NJDEP identified GE as the responsible party under New Jersey law, and GE's Remedial Project Manager for the Site and Licensed Site Remediation Professional were in control of decision-making with respect to environmental compliance at all times. GE and its expert have gone to great lengths to document each communication evidencing what is, in reality, a normal business relationship between BRG and the Albanese Entities. However, GE conspicuously fails to acknowledge that from the moment BRG acquired the Site, GE has been the sole operator with respect to environmental compliance, both under New Jersey law and pursuant to the Indemnity & Settlement Agreement between BRG and GE. In fact, when BRG notified GE of the elevated mercury levels in the buildings in October of 2015, it was GE who advised BRG to continue conducting development-related lead paint stabilization.[1]

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[1] BRG can provide records of contemporaneous bi-weekly construction meetings that include GE consultants, as well as contemporaneous notes taken by BRG during telephone calls with GE's Remedial

II. BRG's Activities at the Site Do Not Constitute "Operation" Under CERCLA Section 107(a)

BRG's pre-development activities at the Site, which were limited in scope and duration, do not constitute "operation" of a "facility" under CERCLA sufficient to attach current operator liability to either BRG or the Albanese Entities. GE's reliance on *Bonnieview Homeowners Ass'n v. Woodmont Builders*, L.L.C., 655 F. Supp. 2d 473 (D.N.J. 2009) and *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338 (9th Cir. 1992) is misplaced. BRG's lead paint stabilization work, asbestos removal and limited interior demolition is clearly distinguishable from the facts presented in the cases cited by GE. In those cases, the offending parties engaged in extensive excavation and grading activities that disturbed and redistributed contamination throughout the Site. GE has presented no evidence that BRG's pre-development activities, which were conducted within the buildings and in coordination with GE itself, had any impact on the levels of mercury observed in the buildings or the dispersal of mercury throughout the structures – because it does not have any evidence. Further, GE's citations to a general statement in an EPA guidance document regarding mercury agitation and its own consultant's self-serving statements in a draft report submitted to EPA are unsupported by the record.[2]

GE is unable to demonstrate that any activities undertaken at the Site by BRG during its brief tenure of ownership prior to its cessation of all predevelopment activities had any material impact on the mercury contamination observed in the buildings today. To expand the scope of operator liability to BRG would therefore be improper, and going a step further to attach such liability to the Albanese Entities would diverge from the precedent set by well-established Superfund law.

III. BRG is a Bona Fide Prospective Purchaser

As described in detail in BRG's letters to Eric Wilson and to you in August and September of last year, BRG meets all of the qualifications of a bona fide prospective purchaser. For the sake of brevity, we will not repeat those arguments in full here. However, in light of our forthcoming discussions regarding the draft administrative order on consent and the arguments propounded by GE in its submission regarding the Albanese Entities, we believe it is important to emphasize the due care that BRG has taken since it acquired the Site in June 2015.

Project Manager regarding mercury levels observed in October 2015. GE's omission of these facts in all of its submissions is significant.

2 The waste manifest documenting BRG's lead paint stabilization work shows that mercury was either not present in the waste generated during lead paint abatement activities, or present at levels below the threshold for land disposal restrictions. Documentation can be provided upon request.

Upon discovering the elevated mercury vapor levels at the Site on October 13, 2015 (five months after closing), BRG notified GE's Remedial Project Manager Roy Blickwedel and GE's consultants via email within 2 hours of receiving the data. BRG subsequently discussed the mercury readings with Roy Blickwedel on October 15, 2015. Mr. Blickwedel noted that: i) the recently determined mercury vapor levels were "frankly not that bad" based on his experience with the Grand Street, Hoboken remediation, ii) he had no issue nor concern with BRG proceeding with interior demolition and lead paint stabilization, but suggested that iii) BRG should establish a "stop-work" level in advance for mercury vapor potentially disturbed by the work with continued mercury vapor monitoring. At no point did Mr. Blickwedel recommend that BRG's work be suspended or that the scope, methods or means be modified.

During this period, in October 2015, Mr. Blickwedel disclosed to BRG personnel that he had extensive, relevant and recent mercury remediation experience at the remedial project manager on GE's Grand Street, Hoboken Superfund Site. Accordingly, BRG relied extensively on Mr. Blickwedel's expertise and experience and recommendations in his role as Remedial Project Manager for GE, in addition to conferring with BRG's environmental consultants for guidance: i) as to whether to proceed with further predevelopment work or not, and if so, ii) how to prevent any limited mercury contamination from entering the environment and, iii) how to prevent potentially endangering worker health and safety. BRG's work was undertaken carefully based on this advice from GE to prevent any contamination to the buildings, threatened future release and prevent and limit any human, environmental or natural resource exposure to mercury at the Site.

BRG subsequently met with GE and its consultants on October 28, 2015 after the mercury vapor readings had been taken in all three buildings; the mercury results and implications were discussed again with Roy Blickwedel at this meeting. This meeting was one of many routine coordination meetings referenced *supra*, between BRG, GE and their respective consultants at the BRG field office in Harrison, NJ following BRG's acquisition of the property.

GE intentionally omitted these (and other) key facts from all of its submissions to EPA, in an effort to mislead EPA, because they undermine GE's claims that BRG operated the Site. All of BRG's actions subsequent to the receipt of the elevated mercury vapor data in October 2015 were undertaken with the knowledge and blessing of GE, the party with far greater experience and knowledge of best practices when addressing mercury contamination and remediation, and the party solely responsible for the mercury contamination at the Site.

In sum, GE and its consultants acknowledge that (1) GE/RCA is the sole polluter of mercury at the Site; (2) GE/RCA left the mercury in the buildings 50+ years ago; (3) the mercury contamination is so extensive that the buildings cannot be reused and need to be

dismantled, demolished and remediated. GE is responsible and obligated to clean up its mercury contamination under federal law.

We look forward to continuing the discussions concerning the administrative order on consent with you and are encouraged that EPA is moving to have the removal action completed as quickly as possible. We respectfully request that you either dismiss GE's request outright, or, if deemed necessary, provide BRG with the opportunity to rebut GE's expert report prior to making a determination with respect to the Albanese Entities' liability.

Very truly yours,

DENNIS M. TOFT
Member

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